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Cheryl L. Galante

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THE DIAL CORPORATION
19001 N. Scottsdale Road
SCOTTSDALE, AZ 85255

EXAMINER

SOROUGH, LAYLA

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHERYL L. GALANTE, DAVID L. ELLIOTT,
IRIS DAVIS GERSTEN, JAMES L. SOLAN
and HERMES VAN DER LEE

Appeal 2010-001235
Application 09/784,488
Technology Center 1600

Before DEMETRA J. MILLS, FRANCISCO C. PRATS, and
MELANIE L. McCOLLUM, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

The following claim is representative:

1. A product for underarm application, the product including an application surface that contacts the underarm during use of the product, the product comprising
a container, and
a first product portion having a first composition and a second product portion having a second composition, wherein one portion is firmer than, and provides support for, the other portion, wherein both the first composition and the second composition comprise an antiperspirant salt suspended in an anhydrous, hydrophobic vehicle including one or both of a volatile silicone and a wax having a melting temperature of at least 70 degrees C, and both the first composition and the second composition form part of the application surface.

Cited References

The Examiner relies on the following prior art references:

| | | |
|-----------------|-----------------|---------------|
| Banowski et al. | US 6,569,438 B1 | May 27, 2003 |
| Swaile et al. | US 5,968,489 | Oct. 19, 1999 |

Grounds of Rejection

1. Claims 1, 5, 7, 9, and 11 are rejected under 35 U.S.C. § 102(b) for anticipation over Banowski.
2. Claims 8, 13, 16, 20, 21, 61, 63 and 66-67 are rejected under 35 U.S.C. § 103(a) for obviousness over Banowski in view of Swaile.

FINDINGS OF FACT

The findings of fact relevant to all rejections are set forth below.

1. Banowski et al. teach dermatological stick formulations comprising antiperspirant agents such as sodium aluminum chlorohydroxylactate

- (*See* Banowski, col. 3, ll. 5-23) and two or more separate, differently composed gel phases, wherein the phases contain deodorant or perspiration-inhibiting actives. (*See Id.* at col. 1, ll. 47-60; col. 3, ll. 1-22.)
2. The phases may differ in color and/or content of polymer powder and the active ingredients. (*See Id.* at col. 4, lines 38-42.) The compositions Banowski et al. contain water, gelling agents, waxes, polyhydric alcohols and other conventional cosmetic agents; for example magnesium stearate. (*See Id.* at col. 2, ll. 3-33.) The core phase of the composition may be cylindrical or “be arranged parallel to the longitudinal axis of the stick.” (*Id.* at col. 5, ll. 10-18.)
 3. According to the Examiner, with respect to the claimed limitation “one portion is firmer than, and provides support for the other portion,” it is noted that some compositions exemplified by Banowski et al. contain different amount of waxes in core part (“K”) and shell or jacket part (“H”), which would result in different firmness of the compositions. See, for example, col. 10, lines 50-60 (K9 and H6 composition).” (Ans. 3-4.)
 4. “Banowski et al. does not teach the hydrophilic vehicle in the percentage of the instant claims.” (Ans. 4.)
 5. “Swaile teaches hydrophilic vehicles in the percentage claimed (see Examples).” (*Id.*)
 6. The Examiner concludes that “[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to optimize the dose range of Banowski et al.’s compound by routine experimentation (see 2144.05 11). The motivation to optimize the dose range of

the Banowski et al.'s final formulation is because one would have had a reasonable expectation of success in achieving the safest clinical outcome.” (Ans. 4-5.)

PRINCIPLES OF LAW

To anticipate, every element and limitation of the claimed invention must be found in a single prior art reference, arranged as in the claim. *See Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed. Cir. 2001).

“In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness. Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant.” *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993) (citations omitted). In order to determine whether a *prima facie* case of obviousness has been established, we consider the factors set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966): (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; (3) the level of ordinary skill in the relevant art; and (4) objective evidence of nonobviousness, if present.

Discussion

1. Claims 1, 5, 7, 9, and 11 are rejected under 35 U.S.C. § 102(b) for anticipation over Banowski.

ISSUE

With respect to the anticipation rejection, the Examiner concludes that Banowski teaches each element claimed.

Appellants argue that Banowski does not disclose anhydrous hydrophobic phases, as claimed.

The issue is: Does the cited prior art teach anhydrous hydrophobic phases, as claimed?

ANALYSIS

Appellants argue that Banowski does not disclose anhydrous hydrophobic phases, as claimed. According to the Appellants, the vehicle composition as a whole must be characterized as hydrophobic. We agree.

Upon review of the record, we do not agree with the Examiner that Banowski discloses such a hydrophobic vehicle. In particular, Banowski discloses in the Examples (*see* Reply Br. 4) that the compositions therein comprise primarily hydrophilic ingredients, and the Examiner does not point to any evidence of record suggesting that an ordinary artisan would have considered compositions comprised primarily of hydrophilic ingredients to be hydrophobic vehicles. We therefore reverse the anticipation rejection over Banowski.

2. Claims 8, 13, 16, 20, 21, 61, 63 and 66-67 are rejected under 35 U.S.C. § 103(a) for obviousness over Banowski in view of Swaile.

The Examiner finds that “Banowski et al. does not teach the hydrophilic vehicle in the percentage of the claims.” (Ans. 4.) The Examiner relies on Swaile for the disclosure of hydrophilic vehicles in the percentage claimed.

The Examiner has failed to indicate how Swaile makes up for the deficiency of Banowski in teaching an anhydrous, hydrophobic vehicle, as claimed. As noted above, “the examiner bears the initial burden of

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presenting a *prima facie* case of obviousness.” *In re Rijckaert, supra*. The obviousness rejection is reversed.

CONCLUSION OF LAW

The anticipation and obviousness rejections are reversed.

REVERSED

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THE DIAL CORPORATION
19001 N. SCOTTSDALE ROAD
SCOTTSDALE, AZ 85255